

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

REBECCA ELMORE,
Plaintiff,

v.

JOSEPH LEHMAN,
Defendant.

Case No. C05-5836RJB

REPORT AND
RECOMMENDATION

Noted for March 24, 2006

This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR 4. The matter is before the court on plaintiff's failure to respond to the court's order directing plaintiff to amend his proposed complaint (Dkt # 4), which explained that it did not appear plaintiff had adequately alleged a constitutional or federal cause of action. The matter is also before the court as it appears plaintiff's claims are barred by the statute of limitations.

After reviewing the motion the record, the undersigned recommends that the Court dismiss plaintiff's complaint and causes of action.

PROCEDURAL AND FACTUAL BACKGROUND

On December 30, 2005, Plaintiff submitted a pro se civil rights lawsuit under 42 U.S.C. § 1983, naming Joseph Lehman, Secretary of the Department of Corrections (DOC), as a Defendant.

(Dkt. #1). In his Complaint Mr. Elmore claims that he was unlawfully detained by defendant past his earned early release date (“EERD”). Complaint at 2. According to the Complaint, Mr. Elmore was a Washington State DOC prisoner from 1994 to 1999. *Id.* at 2, ¶ 1. Plaintiff alleges he was unlawfully detained past his earned early release date (“EERD”) of December 25, 1997, and he was imprisoned by defendant until July 11, 1999, when he was released from custody of the Washington State Department of Corrections. Plaintiff seeks general damages in the amount of \$1500.00 per day that he spent in prison beyond his EERD, punitive damages, and “any other relief the court feels a need to impose.” *Id.* at 3.

DISCUSSION

The appropriate statute of limitations for a § 1983 claim is the forum state’s statute of limitations for tort actions. Wilson v. Garcia, 471 U.S. 261, 269 (1985). Washington State provides a three year statute of limitations for tort claims. RCW 4.16.080(2) (1998). Accordingly, the statute of limitations applicable to plaintiff’s § 1983 claim is three years. See, e.g., Joshua v. Newell, 871 F.2d 884, 886.

Here, Mr. Elmore indicates that the allegations giving rise to his Civil Rights Complaint occurred when he was unlawfully detained past his earned early release date. He states that his earned early release date was December 25, 1997. Arguably his claim for release and damages arose at that time. Mr. Elmore further states that he was released from prison on July 11, 1999. Significantly, plaintiff applied for in forma pauperis status and submitted his proposed Complaint to the court on or about December 19, 2005 (the date his initial pleadings were signed), which is more than six years after his release from DOC custody and almost eight years since his EERD. Clearly, the court should dismiss his untimely claims.

After reviewing the merits of the complaint, the court further finds that plaintiff’s allegations based on his EERD do not appear to present a cognizable claim. have merit. A prison inmate has no constitutional right to release before expiration of his or her sentence. Greenholtz v. Inmates of Nebraska, 442 U.S. 1 (1979). Washington State appellate courts recognized an independent state created interest in amassing early release credits. In Re Galvez, 79 Wn. App 655 (1995). The

1 Washington State Court of Appeals, Division 1, found there to be a “limited liberty interest” in
2 earned early release credit which requires minimal due process. In re Crowder, 97 Wn. App. 598
3 (1999). In Dutcher the same appellate court emphasized it was proceeding under RAP 16.4, which
4 did not require a finding of a constitutional violation but rather only a finding of unlawful restraint
5 under state law. Dutcher, supra at p. 758 (fn. 3 and 4, citing In re Cashaw, 123 Wn. 2d 138 (1994)).

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7 The plaintiff in Cashaw filed a personal restraint petition (PRP) which challenged the actions
8 of the Indeterminate Sentence Review Board in setting his minimum prison term to coincide with the
9 remainder of his court-imposed maximum sentence. The Court of Appeals granted the “PRP after
10 concluding the Board’s failure to follow its own procedural rules violated Cashaw’s due process
11 rights.” Cashaw, supra, at p. 140. While the Washington Supreme Court affirmed the grant of the
12 PRP, it did so on the ground that “an inmate may be entitled to relief solely upon showing the Board
13 set a minimum term in violation of a statute or regulation.” Cashaw at p. 140. The Washington
14 Supreme Court disagreed, however, with the Court of Appeals and found “that no due process
15 liberty interest was created here, for the Board’s regulations imposed only procedural, not
16 substantive, requirements.” Cashaw at p. 140. The state court affirmed the notion that “procedural
17 laws do not create liberty interests; only substantive laws can create these interests.” Cashaw, supra
18 at p. 145. The Washington State Supreme Court in Cashaw was careful to grant relief only on state
19 grounds. Indeed, the State Supreme Court in Cashaw analyzed what is needed to find a state created
20 liberty interest and found no due process violation in that case. The court stated:

21 Liberty interests may arise from either of two sources, the due process clause
22 and state laws. Hewitt v. Helms, 459 U.S. 460, 466, 103 S.Ct. 864, 868, 74 L.Ed.2d
23 675 (1983); Toussaint v. McCarthy, 801 F.2d 1080, 1089 (9th Cir.1986), cert.
24 denied, 481 U.S. 1069, 107 S.Ct. 2462, 95 L.Ed.2d 871 (1987). The due process
25 clause of the federal constitution does not, of its own force, create a liberty interest
26 under the facts of this case for it is well settled that an inmate does not have a liberty
27 interest in being released prior to serving the full maximum sentence. Greenholtz v.
28 Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 7, 99 S.Ct. 2100,
2103, 60 L.Ed.2d 668 (1979); Ayers, 105 Wash.2d at 164-66, 713 P.2d 88; Powell,
117 Wash.2d at 202-03, 814 P.2d 635.

However, as indicated above, state statutes or regulations can create due
process liberty interests where none would have otherwise existed. See Hewitt, 459

U.S. at 469, 103 S.Ct. at 870; Toussaint, 801 F.2d at 1089; Powell, 117 Wash.2d at 202-03, 814 P.2d 635. By enacting a law that places substantive limits on official decision making, the State can create an expectation that the law will be followed, and this expectation can rise to the level of a protected liberty interest. See Toussaint, 801 F.2d at 1094.

For a state law to create a liberty interest, it must contain "substantive predicates" to the exercise of discretion and "**specific directives to the decision maker that if the regulations' substantive predicates are present, a particular outcome must follow**". Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 463, 109 S.Ct. 1904, 1910, 104 L.Ed.2d 506 (1989); Swenson v. Trickey, 995 F.2d 132, 134 (8th Cir.), cert. denied, 510 U.S. 999, 114 S.Ct. 568, 126 L.Ed.2d 468 (1993). **Thus, laws that dictate particular decisions given particular facts can create liberty interests, but laws granting a significant degree of discretion cannot.**

In Re Cashaw, 123 Wn 2d at 144 (emphasis added).

The Department of Corrections has been mandated by statute to implement a system that allows for the possibility of early release. For some inmates their release is automatic when they reach their earned early release date because they have no supervision following incarceration. Inmates who were sentenced to community placement or community custody, cannot earn this reduction in sentence. Instead, they earn a possibility of being placed on community placement or community custody at the discretion of the Department of Corrections. Their release is not automatic.

In Dutcher, the Court of Appeals proceeded pursuant to RAP 16.4 (Personal Restraint Petition - Grounds for Remedy). The court used a standard of review which did not require the finding of a constitutional violation. The ruling in Dutcher that the department must follow the state statutory system and consider plans on the merits does not equate to a finding of a state created liberty interest in release and the holding in Dutcher did not eliminate the departments' discretion.

In 1995 the United States Supreme Court examined the methodology used to determine if state laws or regulations created liberty interests in a prison context and the Court adopted a new approach. Sandin v. Conners, 515 U.S. 472 (1995). The decision in Sandin was a reaction to the practice of combing state regulations for mandatory language to find liberty interests. The refusal to investigate a proposed plan does not lead to violation of a constitutionally protected right. There is no change in the incidents of normal prison life and the inmate is held until the expiration of his

1 sentence. Accordingly, it would not appear that Mr. Elmore's claims presented here present a
2 cognizable federal claim

3 Irregardless of the merits of Mr. Elmore's claims, after reviewing the matter the court finds
4 he failed to bring his EERD claim in a timely fashion. This action was commenced more than three
5 years since his claim arose or since he was reasonably aware that his civil rights may have been
6 violated by defendant's alleged actions. The court should dismiss this case based on the applicable
7 three-year statute of limitations.

8 CONCLUSION

9 For the reasons outlined above the undersigned recommends **dismissal** of plaintiff's
10 complaint and causes of action. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules
11 of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written
12 objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those
13 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit
14 imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **March 24, 2006**, as
15 noted in the caption.

16 DATED this 2nd day of March, 2006.

17 /s/ J. Kelley Arnold

18 J. Kelley Arnold
19 United States Magistrate Judge
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